PERBADANAN PENGURUSAN RUMAH PANGSA TAMAN TASIK UTAMA LOT 11846 v. METACORP PROPERTIES SDN BHD

HIGH COURT MALAYA, MELAKA
VAZEER ALAM MYDIN MEERA J
[CIVIL SUIT NO: 22NCvC-29-06-2016]
7 SEPTEMBER 2017

LAND LAW: *Strata title – Management corporation – Common property – Claim for rental for usage of common property – Whether there was a tenancy agreement between management body and developer – Whether developer had duly delivered vacant possession of the common area – Whether there was a cause of action to claim for arrears of rental – Whether Commissioner of Buildings empowered to order rental be paid or to determine amount of rental payable*

LAND LAW: *Strata title – Management corporation – Common property – Claim for damages for trespass – Whether developer had control and occupation of common areas – Whether there was agreement that developer maintain common area – Whether parties had full knowledge of developer being in lawful occupation of common area – Whether developer was trespassing*

LAND LAW: *Strata title – Management corporation – Common property – Payment of sinking fund – Whether arose when certificate of fitness issued for entire development and individual purchaser given vacant possession – Whether developer ordered to pay sinking fund*

LAND LAW: *Common property – Management corporation – Claim for rental for usage of property and damages for trespass – Whether there was tenancy agreement between management body and developer – Whether developer had duly delivered vacant possession of the common area – Whether there was cause of action to claim for arrears of rental – Whether Commissioner of Buildings empowered to order rental be paid or to determine amount of rental payable – Whether developer had control and occupation of common areas – Whether developer was trespassing – Payment of sinking fund – Whether arose when certificate of fitness issued for entire development and individual purchaser given vacant possession – Whether developer ordered to pay sinking fund*

The defendant was the developer of a housing project ('the project') and had obtained a development order for the construction of 360 units of medium cost apartments in six blocks known as blocks A, B, C, D, E and F, Phase 9C. University Teknikal Malaysia Melaka ('UTeM') was desirous of leasing *en bloc* the apartment units in blocks A and B for their student's accommodation. Thus, the development order was amended at the request of UTeM such that 14 units of apartments in the ground floor of blocks A and B were amalgamated and converted to be used as common facilities area for the use of the UTeM students. A tenancy agreement was entered into between the defendant and UTeM for the entire blocks A and B. At all material times, blocks A and B and the immediate surrounding area was

fenced by the defendant upon the request and instruction of UTeM. Subsequently, the defendant constructed blocks C, D, E and F, and the certificate of fitness for occupation (CF) was obtained. The defendant sold the apartments comprised in blocks C, D, E and F. When making the application for strata titles in 2008, the defendant did not apply for separate strata titles in respect of the 14 units in blocks A and B as they were no longer considered as individual parcel units. Under the Strata Titles Act 1985 ('Strata Titles Act'), as there were no strata titles issued for these 14 units, the area comprised therein automatically became common property and therefore belonged to the Joint Management Body/Management Corporation ('JMB') of Phase 9C. The JMB and subsequently the plaintiff had possessory rights in respect of the common property. The plaintiff's predecessor, *ie*, the JMB, had issued a letter to the defendant confirming the agreement reached between the parties to the effect that JMB will maintain and manage the common property in blocks C, D, E and F while the defendant was to maintain and manage blocks A and B and the surrounding fenced up areas. The tenancy agreement between the defendant and UTeM had since expired and the chain fence surrounding blocks A and B was removed. The defendant had then refurbished both blocks A and B, including the common property, and started selling their parcels units to individual purchasers. The plaintiff submitted that the defendant had exclusively used the common property within blocks A and B and as such, the plaintiff claimed rental for the usage of the said common property/area. In the alternative, the plaintiff claimed damages for trespass of the common property/area. The plaintiff also claimed arrears of sinking fund in the sum of RM4,542 per annum. The defendant, however, denied the claim and stated there was no tenancy agreement between the plaintiff and the defendant and that their exclusive use of the common areas within the fenced up blocks A and B was with the express agreement of the plaintiff and/or its predecessor JMB.

Held (dismissing plaintiff's claim for rental and damages for trespass; allowing plaintiff's claim for sinking fund):

(1) The defendant had control and occupation of the common areas in the whole of Phase 9C until the formation of the JMB on 16 August 2008 pursuant to s. 7 of the Buildings and Common Property (Maintenance and Management) Act 2007. Thus, the defendant was in lawful occupation of the common areas that was the subject matter of this suit from the very beginning. The plaintiff's predecessor, JMB, had agreed that the defendant as owner of the entire blocks A and B, would continue to maintain these two blocks and the said common area at the defendant's cost. This arrangement carried on even after the formation of the plaintiff on 25 April 2014 as a management corporation pursuant to the Strata Titles Act. The JMB's agreement to this arrangement was found in its letter dated 31 January 2011 and the Chairman of the JMB had signed that letter. The said Chairman was also the current Chairman of the plaintiff. Therefore, the plaintiff and its predecessor JMB had full

knowledge of the defendant having exclusive control of common areas within the fenced up area of blocks A and B since before the JMB was formed. Hence, it could not be gainsaid that the defendant was trespassing onto these common areas. (para 20)

(2) A claim for rental presupposes the existence of a tenancy. Herein, there was no agreement in place between the parties for tenancy of the common areas. It was also understood between the parties that vacant possession of the common property in blocks A and B would only be delivered by the defendant to the plaintiff upon completion of the renovation and refurbishment works that became necessary after UTeM's tenancy of blocks A and B had come to an end. The defendant had since then given possession of these common areas to the plaintiff. Thus, the plaintiff did not have any cause of action to claim for arrears of rental for the defendant's use of the common areas in blocks A and B. (paras 23-28)

(3) There is no provision in the relevant statutes empowering the Commissioner of Buildings ('COB') to order for rental to be paid by the defendant nor to determine the amount of rental payable. The COB's involvement in this dispute and the decision directing the defendant to make payment of rental at a rate determined by the COB was clearly *ultra vires* the COB's jurisdiction conferred by statute. (para 30)

(4) The defendant had never disputed its statutory responsibility to pay sinking fund to the plaintiff. The responsibility of the defendant to pay the sinking fund arose from when the CF was issued for the entire development and the individual purchasers were given vacant possession of their units, for these individual parcel owners would have paid sinking fund from that year onwards. Limitation does not bar this claim as there was acknowledgement by the defendant to pay the sinking fund and also there had been attempts by the defendant to tender payment. Thus, the defendant was ordered to pay the sinking fund. (paras 33 & 35).

Case(s) referred to:

Badan Pengurusan Bersama Paradesa Rustika v. Sri Damansara Sdn Bhd [2013] 9 CLJ 813 FC ***(refd)***

JMB Silverpark Sdn Bhd v. Silverpark Sdn Bhd & Anor [2012] 1 LNS 1082 HC ***(refd)***

Tan Wee Choon v. Ong Peck Seng & Anor [1985] 1 CLJ 478; [1985] CLJ (Rep) 798 HC ***(refd)***

YY Property Solutions Sdn Bhd v. Kuok Chiu Hoon Selina & Ors [2013] 1 LNS 1027 CA ***(refd)***

Legislation referred to:

Building and Common Property (Maintenance and Management) Act 2007, ss. 7, 16(5)

A *For the plaintiff - Goh Peng Hong & Tan Yee Sang; M/s Lai, Goh & Assocs*
For the defendant - Sekar Palaniandy, Salina Taib & Nur Armanina Omar; M/s Salina Taib & Co

Reported by Suhainah Wahiduddin

B

PENGHAKIMAN

Vazeer Alam Mydin Meera J:

[1] The defendant is a licensed developer under the Housing Development (Control and Licensing) Act 1966 with an address at No. 1, Jalan Batu Caves,
C 68100 Batu Caves, Selangor DE.

[2] The defendant is the developer of a housing project called "Taman Tasik Utama Ayer Keroh Melaka Fasa 9C" on a plot of leasehold land of 99 years held under H.S.(D) No. 51038, P.T. No. 5538, Mukim Baru, Daerah Melaka Tengah, Negeri Melaka (hereinafter referred to as "the project").
D

[3] The defendant had obtained a development order on 23 October 1988 for the construction of 360 units of medium-cost apartments in six blocks known as blocks A, B, C, D, E & F, Phase 9C, Taman Tasek Utama, Air Keroh, Melaka.

E **[4]** Universiti Teknikal Malaysia Melaka (UTeM) was desirous of leasing *en block* the apartment units in blocks A and B for their students' accommodation. Thus, the development order was amended on 30 January 2002 at the request of UTeM such that 14 units of apartments in the ground floor of blocks A and B were amalgamated and converted to be used as
F common facilities area for the use of the students of UTeM. These 14 units of apartments measured approximately 10,864 sq ft in area.

[5] The defendant initially proceeded to construct only blocks A and B, and the certificate of fitness for occupation (CF) was obtained for blocks A and B comprising 104 units of medium cost apartments on 1 November
G 2002. The defendant is the unit owner of all these 104 units of medium cost apartments as none were sold to the public.

[6] On 17 April 2003, a tenancy agreement was entered into between the defendant and UTeM for the entire blocks A & B be used as hostel accommodation for the students of UTeM. At all material times, blocks A
H and B and the immediate surrounding area fenced up by the defendant upon the request and instruction of UTeM. This was done to ensure safety and security for the students, and to keep out trespassers.

[7] Subsequently, the defendant constructed blocks C, D, E and F, and the
I CF was obtained in 2005. The defendant sold the apartments comprised in blocks C, D, E and F to the public in 2005 and 2006. When the purchasers of the apartment units in these four blocks took possession and moved in, blocks A and B were already occupied by students of UTeM and the fence surrounding these two blocks was standing.

[8] The strata titles for the project were issued in year 2009. According to the strata plan approved by the relevant authority, the numbering for the certified plan (building) is as follows:

Building:	No. PA(B):
M1	PA(B) 43295-01 hingga 43295-03
M2	PA(B) 43423-01 hingga 43423-03
M3	PA(B) 43424-01 hingga 43424-03
M4	PA(B) 43425-01 hingga 43425-03
M5	PA(B) 43426-01 hingga 43426-03
M6	PA(B) 43427-01 hingga 43427-03

Blocks M1 to M6 in the strata certified plan correspond to the original blocks A to F in the development order.

[9] When making the application for strata titles in 2008, the defendant did not apply for separate strata titles in respect of the 14 units in blocks A and B which had been converted into the common facility area for the use of the students, as these were no longer considered as individual parcel units. Under the Strata Titles Act 1985 (Act 318) as there were no strata titles issued for these 14 units, the area comprised therein automatically became common property and therefore belonged to the joint management body/ management corporation of phase 9C. The JMB and subsequently the plaintiff had possessory rights in respect of the common property. See *JMB Silverpark Sdn Bhd v. Silverpark Sdn Bhd & Anor* [2012] 1 LNS 1082; [2013] 9 MLJ 714.

[10] The joint management body ("JMB") was formed on 16 August 2008 pursuant to s. 7 of the Building and Common Property (Maintenance and Management) Act 2007.

[11] As the entire blocks A and B were occupied by UTeM students, there were no reasons whatsoever for the owners or residents of blocks C, D, E and F, to enter the common property of blocks A and B, ie, to utilise the common area and the corridors and staircases therein as there is no common facility or commercial activity in those areas.

[12] Neither the owners or residents of blocks C, D, E and F, nor for that matter the plaintiff, ever complained to the defendant about the existence of the students of UTeM in blocks A and B. Nor did they raise any complaints regarding the chain fence surrounding blocks A and B which restricted their access onto the common areas in blocks A and B.

[13] The plaintiff's predecessor, ie, the JMB, had issued a letter dated 31 January 2011 to the defendant confirming the agreement reached between the parties at a meeting held on 13 December 2010 at the Majlis Perbandaran Hang Tuah Jaya, Melaka, to the effect that the JMB will maintain and

manage the common property in blocks C, D, E and F, while the defendant is to maintain and manage blocks A and B and the surrounding fenced-up areas at the defendant's own cost.

[14] The tenancy agreement between the defendant and UTeM has since expired and the chain fence surrounding blocks A and B was removed in 2013. The defendant had then refurbished both blocks A and B, including the common property, and have since March 2016 started selling their parcels units to individual purchasers.

[15] The plaintiff was established on 25 April 2014 as a management corporation pursuant to the Strata Titles Act.

[16] The plaintiff's claim is for arrears in rental or in the alternative damages for trespass. The plaintiff's claim, in a summary, is that the defendant had exclusively used the common property within blocks A and B, including the area comprising the 14 parcel units which were converted into students' common area as well as the corridors and the surrounding common property/area (outside the buildings) which was fenced-up by the defendant at the material time. As such, the plaintiff claims rental for the usage of these common property/area. In the alternative, the plaintiff claims damages for trespass of these common property/area. The plaintiff also claims arrears of sinking fund in the sum of RM4,452 per annum from January 2006, together with interest and costs.

[17] Thus, the plaintiff's prayers for relief are as follows:

(a) Rental totaling RM5,188,806 for the years 2006 to 2015 comprising:

(i) Rental in the sum of RM28,986 per month for the use of the common property (measuring 38,648 sq ft) ie, the fenced up area;

(ii) Rental of RM6,312 per month for the common property in blocks A and B (measuring 8,416 sq ft);

(b) Sinking fund of RM4,452 per year amounting to RM64,554 with late interest at 10% per annum;

(c) Rental at the rate of RM28,986 per month for common property (measuring 38,648 sq ft) ie, the fenced up area and rental of RM6,312 per month for the common property in blocks A and B (measuring 8,416 sq ft) until delivery of vacant possession to the plaintiff;

(d) Sinking fund at RM4,452 per year to RM64,554;

(e) Interest at 5% per annum on the abovestated sums from the date of the summons till the date of judgment and further till the date of full payment; and

(f) Cost.

[18] The defendant denies the claim and states that there is no tenancy agreement between the plaintiff and the defendant for the defendant to pay rental to the plaintiff, nor do they admit they are trespassing onto the

common property belonging to the plaintiff. The defendant contends that their exclusive use of the common areas within the fenced-up blocks A and B was with the express agreement of the plaintiff and/or its predecessor JMB.

[19] I dismissed the plaintiff's claim for rental and damages for trespass. However, I allowed the claim for sinking fund. The grounds for my decision are as follows.

[20] The defendant was the developer and owner of the entire apartment units in blocks A and B. Upon the CF being obtained, both blocks A and B were fenced off and rented out as students' hostel to UTeM. The defendant was managing and maintaining both the blocks and their common areas within the fenced-up zone. When the parcel units in the other blocks were sold to individual purchasers in 2005 and 2006, the purchasers knew well that blocks A and B were fenced off by the defendant and occupied by students as their hostel accommodation. In fact, until the formation of the JMB in 2008, the maintenance and management of the entire phase 9C comprising all the blocks A, B, C, D, E, and F were undertaken by the defendant as the developer. As such, the defendant had control and occupation of the common areas in the whole of phase 9C until the formation of the JMB. Thus, the defendant was in lawful occupation of the common areas that the subject matter of this suit from the very beginning. In fact, in recognition of this, the plaintiff's predecessor, the JMB had at a meeting held at the Majlis Perbandaran Hang Tuah Jaya, Melaka, agreed that the defendant as owner of the entire blocks A and B, would continue to maintain these two blocks and the common area cordoned off within the perimeter fencing at the defendant's cost, whilst the remaining common areas will be maintained and managed by the JMB. This arrangement carried on even after the formation of the plaintiff in 2014. The JMB's agreement to this arrangement is found in its letter dated 31 January 2011, where the relevant portion of the letter reads:

> Tuan,
>
> Pengurusan Dan Penyenggaraan Rumah Pangsa Kos Sederhana Di Taman Tasik Utama Fasa 9C, Ayer Keroh Melaka - 344 Unit (Petak)
>
> Dengan segala hormatnya perkara di atas adalah dirujuk.
>
> 2. Ekoran dari mesyuarat, persetujuan bersama Majlis Perbandaran Hang Tuah Jaya, Melaka yang telah di adakan pada 13 Dis 2010, dimana keputusan telah dipersetujui bersama berkaitan kawasan pentadbiran dan pengurusan Rumah Pangsa Fasa 9C adalah 6 blok (Enam) iaitu blok A, B, C, D, E dan F dimana jumlah unit kediaman (petak) adalah 344 unit.
>
> 3. Hasil dari ketetapan tersebut mulai 01 Feb 2011 kesemua kawasan Harta Bersama kecuali kawasan berpagar (Blok A dan B) akan diselenggarakan (kebersihan) oleh badan ini.
>
> Hussain Hassan as the Chairman of the JMB signed that letter of 31.1.2011. The said Hussain Hassan is the current Chairman of the Plaintiff and was the primary witness (PW3) for the Plaintiff in this matter.

Therefore, the Plaintiff and its predecessor JMB had full knowledge of the Defendant having exclusive control of common areas within the fenced up area of Block A and B since before the JMB was formed. Hence, it cannot be gainsaid that the Defendant was trespassing onto these common areas.

[21] In *Tan Wee Choon v. Ong Peck Seng & Anor* [1985] 1 CLJ 478; [1985] CLJ (Rep) 798; [1986] 1 MLJ 322 Wan Yahya J (as he then was) said:

> Trespass to land unlike criminal trespass is completed once a person wrongfully, *albeit* peaceably, intrudes into the land in the possession of another, even where no damage is done. Trespass to the land covers all unlawful entry and includes taking possession, pulling down or destroying anything permanently fixed to the land. The following passage on what constitutes trespass to land is found a *Halsbury's Laws of England* (3rd edn.) Vol. 38 at page 739:
>
> > Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, although no actual damage is done. A person trespasses upon land if he wrongfully sets foot on, or rides or drives over, it, or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or, it seems, if he erects of suffers to continue on his own land anything which invades the airspace of another, or if he discharges water from another's land, or sends filth or any injurious substance which has been collected by him on his own land on to another's land'.

[22] Thus, given the definition of trespass, the acts complained of by the plaintiff cannot constitute trespass. The defendant was in occupation of the common areas as owner/developer of both the blocks A and B from the beginning until the formation of the JMB. The legal relationship between the defendant and the common area became altered with the coming into force of the Building and Common Property (Maintenance and Management) Act 2007. Even after legal ownership and control of the common areas devolved unto the JMB and thereon to the plaintiff by operation of law, the plaintiff had agreed to the defendant having continued use and occupation of the common areas by expressly agreeing to allow the defendant to maintain and manage the common areas within the fenced off areas of blocks A and B. Thus, the defendant had the express consent and agreement of the plaintiff to occupy these common areas.

[23] Now, I move on to consider the plaintiff's claim for rental for the use of the common areas. A claim for rental presupposes the existence of a tenancy. The question that arises then is whether there was tenancy agreement entered into between the plaintiff and defendant? When the evidence is analysed, I find that there is no agreement in place between the parties for tenancy of the common areas. The plaintiff had some time in 2012 for the first time requested payment of rental from the defendant for the use of the common areas in question at the rate of RM0.75 per sq ft, but the

defendant did not accede to that request. The defendant had counter-proposed a rate of RM0.20 per sq ft. There was some back and forth between the parties by way of correspondence on the issue of the proposed rental to be imposed and the amount of sinking fund payable by the defendant. However, no agreement was reached, hence no tenancy for the common areas came into being. Neither did the plaintiff issue any notice demanding vacant possession of these common areas nor did the plaintiff initiate any eviction proceedings. The plaintiff in para. 36 of their statement of claim admits the fact that there was no acceptance of the defendant's offer. The plaintiff further admits in paras. 21 and 23 of their statement of claim that they were ready and willing to have a discussion (runding) with the defendant pertaining to the method and amount of payment, and this clearly shows that there was no agreement concluded between the defendant and plaintiff for any tenancy for the use of the common areas.

[24] The Court of Appeal's decision in *YY Property Solutions Sdn Bhd v. Kuok Chiu Hoon Selina & Ors* [2013] 1 LNS 1027; [2014] 2 MLJ 344 where it was held that no contract existed as the offer made by the appellant therein was never accepted by the respondent is similar with the present case.

[25] The plaintiff had between 2008 till August 2015 claimed and sent notices of demand to the defendant for the payment of maintenance and management charges for the common property of blocks A and B, and only changed their notice of demand to a claim for rental on 11 September 2015 (p. 44 of bundle B) after they received the defendant's letter dated 1 July 2015. Hence, it is clear that the plaintiff was vacillating, and was unsure as to what it wishes to claim. If it was a claim for maintenance and management charges for the common areas, then the plaintiff is definitely precluded from claiming for the same as the agreement in January 2011 has put to rest that issue.

[26] Mr Tee Kim Siew (DW1) a director of the defendant attended a meeting with the plaintiff at the defendant's Melaka office on 16 December 2014 for the purpose of obtaining the plaintiff's consent for the defendant to enter the common property in blocks A and B to renovate and refurbish the same. DW1 had at the said meeting stated that he did not agree to make any payments as demanded by the plaintiff but would be prepared to come up with some form of compensation in the form of air-conditioners and fans for the plaintiff's management office. This evidence was corroborated by the defendant's staff Cik Zainab binti Hassan's minutes of the meeting (pp. 37 and 38 of bundle A). This statement was also further corroborated by En Mohd Zaki bin Mustafa (DW3) at p. 157 (lines 15-30) and p. 158 (line top to 5) of the notes of evidence.

[27] It was understood between the parties that vacant possession of the common property in blocks A and B would only be delivered by the defendant to the plaintiff upon completion of the renovation and

refurbishment works that became necessary after UTeM's tenancy of blocks A and B had come to an end. The defendant has since then given possession of these common areas to the plaintiff.

[28] Thus, I find that the plaintiff does not have any cause of action to claim for arrears of rental for the defendant's use of the common areas in blocks A and B.

[29] The plaintiff had referred the matter of its claim for rental for the common areas in question to the Commissioner of Buildings ("COB"). The COB had then determined that the defendant should pay rental at the rate of RM0.75 per sq ft for these common areas. The plaintiff has alluded to this fact in its pleadings and is basing its claim alternatively on this determination by the COB. The defendant refutes this and states that the COB does not have any powers under the statute to make such determination or orders. Thus, the question that arises is this - Does the COB have the power to order payment of rental by the defendant to the plaintiff and also to determine the amount of rental payable thereto?

[30] In this regard, I agree with submissions of learned counsel for the defendants that there is no provision in the relevant statutes empowering the COB to order rental be paid by the defendant nor to determine the amount of rental payable. The COB's involvement in this dispute and the decision directing the defendant to make payment of rental at a rate determined by the COB is clearly *ultra vires* the COB's jurisdiction conferred by statute.

[31] This was confirmed by the Federal Court in *Badan Pengurusan Bersama Paradesa Rustika v. Sri Damansara Sdn Bhd* [2013] 9 CLJ 813 (pp. 60-74 of DBA) which involves a decision on s. 16(5) of the Building and Common Property (Maintenance and Management) Act 2007 and the powers of the COB flowing from that provision. The Federal Court held as follows:

> The dispute between the parties was clearly not a dispute in respect of a building maintenance account. Hence, the Commissioner lacked jurisdiction under s. 16(5) of the Act, or under any other provisions of the Act, to give any decision with regard to the sum the appellant claimed must be paid over to them.

The Federal Court also held as follows:

> On the learned judge of the High Court's finding that the respondent's conduct in not challenging the Commissioner's lack of jurisdiction would appear to indicate that the respondent had accepted the Commissioner's jurisdiction to determine the matter, we are in full agreement with the Court of Appeal's view that no amount of consent or acquiescence by the respondent could confer on the Commissioner a power which the Act had not conferred upon him.

Hence, the defendant's non-challenge of the COB's decision in this case is of no consequence, as the non-challenge does not confer jurisdiction on the COB.

[32] Thus, I agree with submissions of learned counsel for the defendant that the COB had unlawfully and *ultra vires* its powers given under the relevant statute issued the following letters pertaining to payment of rental:

(i) letter dated 8 August 2012 to the plaintiff compelling them to accept payment of rental at the rate of RM0.75 per sq ft (exh. P1 p. 225 of bundle A);

(ii) letter dated 27 February 2013 to the defendant (p. 164 of bundle A);

(iii) letter dated 11 July 2013 to the defendant (p. 74 of bundle B); and

(iv) letter dated 9 September 2013 to the defendant (p. 178 of bundle A).

[33] In respect of the claim for sinking fund, the defendant has never disputed its statutory responsibility to pay sinking fund to the plaintiff. However, the defendant's attempts to make payment were consistently refused and cheques returned by the plaintiff and their solicitors on the grounds that the payment of the sinking fund be made together with payment of the maintenance and management charges claimed by them for blocks A and B common areas. The plaintiff in paras. 39 & 40 of SOC and para. 35 of the reply to defence admitted this.

[34] However, just before commencement of trial, both parties agreed that the amount of sinking fund payable per annum by the defendant is RM4,452. However, there was a dispute as to the period of payment and the rate of interest, if any, payable by the defendant. These issues were left for my determination.

[35] Having considered the evidence and law, I find that the responsibility of the defendant to pay the sinking fund arises from year 2005, ie, when the CF was issued for the entire development and the individual purchasers were given vacant possession of their units, for these individual parcel owners would have paid sinking fund from that year onwards. Limitation does not bar this claim as there is acknowledgment by the defendant to pay the sinking fund and also there have been attempts by the defendant to tender payment as late as 24 February 2015. Thus, I ordered that the defendant pay sinking fund in the sum of RM1,442.13 for 2005 and the sum of RM4,442 per annum for the years 2006 to 2016 together with interest at the rate of 5% per annum from date of writ. No order as to cost.

Orders accordingly.